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IV. REVIEW OF AGENCY DECISIONS

A. Introduction

1. Arbitrary and Capricious

The Administrative Procedures Act ("APA") sets forth standards governing judicial review of decisions made by federal administrative agencies. *See Dickinson v. Zurko*, 527 U.S. 150, 152 (1999); *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 638 (9th Cir. 2004); *Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004). Pursuant to the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *United States v. Bean*, 537 U.S. 71, 77 (2002); *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011); *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *High Sierra, Hikers Ass'n*, 390 F.3d at 638; *Public Util. Dist. No. 1*, 371 F.3d at 706.[1] The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 376 (1989); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000).

Review under the standard is narrow and the reviewing court may not substitute its judgment for that of the agency. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001); *Marsh*, 490 U.S. at 378; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011); *Gardner*, 638 F.3d at 1224; *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 829 (9th Cir. 2009); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008); *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2005); *Public Util. Dist. No. 1*, 371 F.3d at 706.[2] The agency,

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[1] *See Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001); *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001).

[2] *Fry v. DEA*, 353 F.3d 1041, 1043 (9th Cir. 2003); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36; *Arizona Cattle Growers' Ass'n*, 273 F.3d at 1235 (noting

however, must articulate a rational connection between the facts found and the conclusions made. *See Latino Issues Forum*, 558 F.3d at 941; *Friends of Yosemite Valley*, 520 F.3d at 1032; *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 858 n.36 (9th Cir. 2003).

The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Marsh*, 490 U.S. at 378; *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36.

The inquiry, though narrow, must be searching and careful. *See Marsh*, 490 U.S. at 378; *Ocean Advocates*, 402 F.3d at 858-59; *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001); *Ninilchik Traditional Council*, 227 F.3d at 1194.

This court may reverse under the arbitrary and capricious standard only if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010) (as amended) (relying on *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008)); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36; *Brower*, 257 F.3d at 1065. Finally, an agency's decision can be upheld only on the basis of the reasoning in that decision. *See California Energy Comm'n v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

2. Constitutional Review

A court may refuse to defer to an agency's interpretation of a statute that raises serious constitutional concerns. *See Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011) (explaining court will not defer to agency

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"narrow scope" of review); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000).

interpretation if it raises "grave constitutional doubts"); *Ma v. Ashcroft*, 257 F.3d 1095,1105 n.15 (9th Cir. 2001) (noting *Chevron* deference is not owed where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe); *Williams v. Babbitt*, 115 F.3d 657, 661-62 (9th Cir. 1997).

Whether an agency's procedures comport with due process requirements presents a question of law reviewed de novo. *See Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (noting no deference is owed to agency); *Gilbert v. Nat'l Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996) (FAA); *cf. Adkins v. Trans-Alaska Pipeline Liability Fund*, 101 F.3d 86, 89 (9th Cir. 1996) (noting courts should usually defer to agency's fashioning of hearing procedures). The constitutionality of an agency's regulation is reviewed de novo. *See Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999).

3. Regulatory Interpretations

This court generally defers to an agency's interpretation of its own regulations. *See Public Util. Dist. No. 1 v. Federal Emergency Mgmt. Agency*, 371 F.3d 701, 706 (9th Cir. 2004); *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (noting "substantial deference"). Deference is owed unless the interpretation is plainly erroneous or inconsistent with regulation. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). Note that in some instances, little or no deference is owed to an agency's interpretation of regulations. *See, e.g, United States v. Mead Corp.*, 533 U.S. 218, 226-28 (2001) (explaining continuum of deference owed); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference).[3]

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[3] *See also Sierra Club v. U.S. Envtl. Prot. Agency*, 671 F.3d 955, 962 (9th Cir. 2012) (explaining that interpretations found in agency manuals, enforcement guidelines, and policy statements, lack the force of law and thus do not warrant deference); *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 792 (9th Cir. 2003) ("considerable less deference" is owed to agency's interpretation that conflicts with prior interpretation); *Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 n.7 (9th Cir. 1996) (no deference owed to interpretation that is contrary to plain and sensible meaning of regulation); *United States v. Trident Seafoods Corp.*, 60 F.3d

Finally, note that interpretative regulations are entitled to less deference than legislative regulations. *See Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 (9th Cir. 2003); *Lynch v. Dawson*, 820 F.2d 1014, 1020 (9th Cir. 1987) (noting "various degrees of deference" owed to interpretative rules). Whether an agency regulation is interpretative or legislative is a question of law reviewed de novo. *See Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1086 (9th Cir. 2003); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1330 (9th Cir. 1997).

4. Sanctions

An agency's imposition of sanctions is reviewed for an abuse of discretion. *See Saberi v. Commodity Futures Trading Comm'n*, 488 F.3d 1207, 1215 (9th Cir. 2007); *Ponce v. SEC*, 345 F.3d 722, 728-29 (9th Cir. 2003); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003) (noting limited scope of review), *amended by* 335 F.3d 1096 (9th Cir. 2003). Thus, a penalty imposed should not be overturned unless it is unwarranted in law or unjustified in fact. *See Saberi*, 488 F.3d at 1215; *Balice v. Dept' of Agric.*, 203 F.3d 684, 689 (9th Cir. 2000); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996).

5. Statutory Interpretations

An agency's interpretation or application of a statute is a question of law reviewed de novo. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006); *Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir.), *amended by* 335 F.3d 1096 (9th Cir. 2003). An agency's interpretation of its statutory mandate is also reviewed de novo. *See Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000).

In reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984)

556, 559 (9th Cir. 1995) (no deference owed to interpretation offered by counsel where the agency has not established a position).

(establishing two-part test for reviewing an agency's interpretation of a statute); *Adams v. U.S. Forest Serv.*, 671 F.3d 1138, 1143 (9th Cir. 2012); *Schneider*, 450 F.3d at 952; *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc) (explaining two-step test), *amended by* 360 F.3d 1374 (9th Cir. 2004); *California Dep't of Soc. Servs. v. Thompson*, 321 F.3d 835, 847 (9th Cir. 2003) (applying *Chevron*). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. *See Chevron*, 467 U.S. at 843; *Putnam Family P'ship v. City of Yucaipa, California*, 673 F.3d 920, 928 (9th Cir. 2012); *Snoqualmie Indian Tribe*, 545 F.3d at 1213; *Schneider*, 450 F.3d at 952; *Bear Lake Watch*, 324 F.3d at 1073. Review is limited to whether the agency's conclusion is based on a permissible construction of the statute. *See Chevron*, 467 U.S. at 843; *Snoqualmie Indian Tribe*, 545 F.3d at 1213; *Espejo v. INS*, 311 F.3d 976, 978 (9th Cir. 2002); *McLean v. Crabtree*, 173 F.3d 1176, 1181 (9th Cir. 1999).

Thus, a federal agency's interpretation of a statutory provision it is charged with administering may be entitled to deference. *See Bear Lake Watch*, 324 F.3d at 1073 (noting "deference [is owed] to an agency's reasonable interpretation of a statutory provision where Congress has left the question to the agency's discretion"); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1175 (9th Cir. 2002) (noting deference unless agency's interpretation is contrary to clear congressional intent or frustrates the policy Congress sought to implement); *Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2000) (noting under the two-part *Chevron* analysis, deference is due the agency's interpretation of a statute unless the plain language is unambiguous "with regard to the precise matter at issue").[4]

Note that no deference is owed to an agency when "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842; *Cmty. Hosp. of Monterey Peninsula v. Thompson*, 323 F.3d 782, 789 (9th Cir. 2003). Courts are also not obligated to defer to an agency's interpretations that are contrary to the plain and sensible meaning of the statute. *See Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008);

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[4] *See also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.) (describing two-step *Chevron* review, and noting when Congress leaves a statutory gap for the agency to fill, any administrative regulations must be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute), *amended by* 197 F.3d 1035 (9th Cir. 1999).

Kankamalage v. INS, 335 F.3d 858, 862 (9th Cir. 2003). No deference is given to an agency's interpretation of a statute that it does not administer or is outside of its expertise. *See Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1163-64 (9th Cir. 2011); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589 (9th Cir. 2008); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (interpreting state law).[5] Moreover, "[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." *Pfaff v. United States Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Thus, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Young v. Reno*, 114 F.3d 879, 883 (9th Cir. 1997) (quoting *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987)); *cf. Queen of Angels/Hollywood Presbyterian Med. Ctr. v. Shalala*, 65 F.3d 1472, 1480 (9th Cir. 1995) (noting an agency "is not disqualified from changing its mind"). Similarly, no deference is owed when an agency has not formulated an official interpretation, but is merely advancing a litigation position. *See United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008); *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).[6] Finally, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue." *Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n*, 83 F.3d 1130, 1133 (9th Cir. 1996).

A state agency's interpretation of a federal statute is not entitled to deference. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (review is de novo); *cf. JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 798 n.8 (9th Cir. 2008) (explaining that although a state agency's interpretation of federal law is not entitled to deference, "the Secretary's approval of that agency's interpretation is due some deference because it

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[5] *See also American Fed. of Government Employees v. FLRA*, 204 F.3d 1272, 1275 (9th Cir. 2000) (noting agency's interpretation of a statute outside of its administration is reviewed de novo).

[6] *See also Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1165 (9th Cir. 1998) (deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice).

shows a federal agency's interpretation of the federal statute that it is charged to administer.").

6. Substantial Evidence

Agency's factual findings are reviewed under the substantial evidence standard. *See Kappos v. Hyatt*, 132 S. Ct. 1690, 1694 (2012); *Dickinson v. Zurko*, 527 U.S. 150, 153-61 (1999) (rejecting "clearly erroneous" review and reaffirming substantial evidence); *East Bay v. Auto. Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007); *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare and Medicaid Servs.*, 424 F.3d 931, 937 (9th Cir. 2005); *Lucas v. NLRB*, 333 F.3d 927, 931 (9th Cir. 2003). Substantial evidence means more than a mere scintilla but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003); *De la Fuente II v. FDIC*, 332 F.3d 1208, 1220 (9th Cir. 2003). The standard, however, is "extremely deferential" and a reviewing court must uphold the agency's findings "unless the evidence presented would *compel* a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.), *amended by* 339 F.3d 1012 (9th Cir. 2003) (internal quotation marks and citation omitted).[7] If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the agency. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003); *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).

The substantial evidence standard requires the appellate court to review the administrative record as a whole, weighing both the evidence that supports the agency's determination as well as the evidence that detracts from it. *See De la Fuente*, 332 F.3d at 1220 (reviewing the record as a whole); *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

A district court's decision to exclude extra-record evidence when reviewing an agency's decision is reviewed for an abuse of discretion. *See*

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[7] *See also Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001) (noting court must "weigh pros and cons in the whole record with a deferential eye"); *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997) (same).

Tri-Valley CAREs v. U.S. Dep't of Energy, 671 F.3d 1113, 1124 (9th Cir. 2012); *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006); *Partridge v. Reich*, 141 F.3d 920, 923 (9th Cir. 1998); *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996); *see also Bear Lake Watch*, 324 F.3d at 1077 n.8 (declining to review extra-record evidence).

Note that when an agency and a hearings officer disagree, the court reviews the decision of the agency, not the hearings officer. *See Maka v. INS*, 904 F.2d 1351, 1355 (9th Cir. 1990), *amended by* 932 F.2d 1352 (9th Cir. 1991); *NLRB v. Int'l Bhd. of Elec. Workers, Local 77*, 895 F.2d 1570, 1573 (9th Cir. 1990).[8] Thus, the standard of review is not modified when such a disagreement occurs. *See Maka*, 904 F.2d at 1355; *Int'l Bhd.*, 895 F.2d at 1573. When the agency rejects the hearings officer's credibility findings, however, it must state its reasons and those reasons must be based on substantial evidence. *See Maka*, 904 F.2d at 1355; *Howard v. Heckler*, 782 F.2d 1484, 1487 (9th Cir. 1986).

This court defers to credibility determinations made by hearings officers. *See Manimbao v. Ashcroft*, 329 F.3d 655, 658 (9th Cir. 2003); *Underwriters Lab., Inc. v. NLRB*, 147 F.3d 1048, 1051 (9th Cir. 1998). Such credibility determinations must be upheld unless they are "inherently or patently unreasonable." *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (internal quotation omitted); *see also Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 914 n.8 (9th Cir. 2006). Although deference is given, a hearings officer must give specific, cogent reasons for adverse credibility findings. *See Manimbao*, 329 F.3d at 658; *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).

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[8] *See also Northern Montana Health Care Ctr. v. NLRB*, 178 F.3d 1089, 1093 (9th Cir. 1999) (as amended) ("We employ the substantial evidence test even if the Board's decision differs materially from the ALJ's."); *Perez v. INS*, 96 F.3d 390, 392 (9th Cir. 1996) (where BIA conducts independent review of the IJ's findings, court reviews BIA's decision, not IJ's).

B. Specific Agency Review

1. Bonneville Power Administration ("BPA")

BPA's decisions are reviewed pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980. *See Public Power Council, Inc. v Bonneville Power Admin.*, 442 F.3d 1204, 1209-10 (9th Cir. 2006); *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613, 617 (9th Cir. 2002). Review is under the Administrative Procedures Act. *See Public Power Council*, 442 F.3d at 1209-10; *Vulcan Power Co. v. Bonneville Power Admin.*, 89 F.3d 549, 550 (9th Cir. 1996) (per curiam). Thus, the agency's final action may be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See Pacific Northwest Generating Co-op. v. Dep't of Energy*, 596 F.3d 1065, 1072 (9th Cir. 2010); *Public Power Council*, 442 F.3d at 1209; *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003); *M-S-R Public Power Agency*, 297 F.3d 833, 841 (9th Cir. 2002) (noting "review of final BPA actions is extremely limited"); *Vulcan Power*, 89 F.3d at 550. Review under this standard is to be searching and careful, but remains narrow, and a court is not to substitute its judgment for that of the agency. *See Public Power Council*, 442 F.3d at 1209; *Aluminum Co. of Amer. v. Administrator, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999); *Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1383 (9th Cir. 1994) (internal quotation omitted).

The court will accord "substantial deference" to the BPA's interpretation of the statute and to its application and interpretation of its regulations. *See Public Power Council*, 442 F.3d at 1210; *Confederated Tribes*, 342 F.3d at 928. Thus, to uphold the BPA's interpretation of the Act, "we need only conclude that it is a reasonable interpretation of the relevant provisions." *See Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1530 (9th Cir. 1997) (internal quotation marks and citation omitted).[9]

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[9] *See also Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928-29 (9th Cir. 2003) (stating standard); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848-49 (9th Cir. 2001) (noting court may reject a construction

Whether a district court has subject matter jurisdiction under the Northwest Power Planning Act to hear challenges to final agency action by the BPA is a question of law reviewed de novo. *See Transmission Agency of California v. Sierra Pacific Power Co.*, 295 F.3d 918, 925 (9th Cir. 2002).

2. Department of Energy

A decision by the Secretary of Energy will be set aside only if it is arbitrary, capricious, or otherwise not in accordance with law. *See Nevada v. U.S. Dep't of Energy*, 133 F.3d 1201, 1204 (9th Cir. 1998). Statutory interpretations are reviewed de novo. *See id.*; *Nevada v. Watkins*, 914 F.2d 1545, 1552 (9th Cir. 1990). Nevertheless, the agency's construction of a statute it is implementing should not be set aside unless that construction conflicts with clear congressional intent or is unreasonable. *See County of Esmeralda v. U.S. Dep't of Energy*, 925 F.2d 1216, 1219 (9th Cir. 1991).

3. Environmental Protection Agency ("EPA")

Final administrative actions of the EPA are reviewed under the standards established by the Administrative Procedures Act. *See Ober v. Whitman*, 243 F.3d 1190, 1193 (9th Cir. 2001); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir.), *amended by* 197 F.3d 1035 (9th Cir. 1999). Whether an EPA decision is final is a question of subject matter jurisdiction reviewed de novo. *See City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001).

The court may reverse the EPA's decision only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See Great Basin Mine Watch v. EPA*, 401 F.3d 1094, 1098 (9th Cir. 2005); *Ober*, 243 F.3d at 1193; *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1248 (9th Cir. 2000). Deference is owed to the EPA's interpretation of its own regulations if those regulations are not unreasonable. *See Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 283 (9th Cir. 1996); *see also Pronsolino v. Nastri*, 291 F.3d 1123, 1131-32 (9th Cir. 2002) (explaining levels of deference owed to the EPA).

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inconsistent with statutory mandates or that frustrate the statutory policies that Congress sought to implement).

4. Federal Communications Commission ("FCC")

FCC decisions may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See California v. FCC*, 75 F.3d 1350, 1358 (9th Cir. 1996); *California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994). Under that standard, this court must determine whether the FCC's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record. *See California*, 75 F.3d at 1358; *California*, 39 F.3d at 925. "The scope of judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference." *California*, 39 F.3d at 925; *see also Howard v. America Online Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000) (upholding FCC's "reasonable" interpretation of the Communications Act).

Whether a district court has subject matter jurisdiction to enforce orders of the FCC is a question of law reviewed de novo. *See United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002) (reviewing district court's refusal to dismiss for lack of jurisdiction). The district court's decision whether to stay enforcement proceedings is reviewed for an abuse of discretion. *See id.* at 838.

5. Federal Energy Regulatory Commission ("FERC")

FERC's findings of fact are conclusive if supported by substantial evidence. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008); *Public Utilities Comm'n of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1073 (9th Cir. 2003); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000). Review of the agency's decision is limited to the arbitrary, capricious, abuse of discretion standard. *See California Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1035 (9th Cir. 2007); *Public Utilities Comm'n*, 462 F.3d at 1045; *California Dep't of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003).

Deference is owed to FERC's interpretation of its own regulations unless plainly erroneous. *See California Dep't of Water Res.*, 489 F.3d at 1035; *Skokomish Indian Tribe v. FERC.*, 121 F.3d 1303, 1306 (9th Cir. 1997); *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997). Deference is also owed to FERC's interpretation of the law it is charged with

administering. *See* *Montana Consumer Counsel v. FERC*, 659 F.3d 910, 915 (9th Cir. 2011); *California Dep't of Water Res.*, 489 F.3d at 1035; *California Trout, Inc. v. FERC*, 313 F.3d 1131, 1134 (9th Cir. 2002) (noting *Chevron* deference); *American Rivers*, 201 F.3d at 1194 (same). Note, however, that FERC's interpretation of its statutory mandate is reviewed de novo. *See* *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003); *Bear Lake Watch*, 324 F.3d at 1073; *California Trout*, 313 F.3d at 1133; *American Rivers*, 201 F.3d at 1194.

6. Federal Labor Relations Authority

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, v. Federal Labor Relations Authority.

7. Federal Trade Commission ("FTC")

The FTC's factual findings are conclusive if supported by evidence sufficient to permit a reasonable mind to accept the Commission's conclusions. *See* *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986); *accord* *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 368 (9th Cir. 1982). The Commission's findings of fact are reviewed under the substantial evidence standard. *See* *California Dental Ass'n v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997), *vacated on other grounds*, 526 U.S. 756 (1999); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993). Under that standard, the Commission's findings of fact will be upheld if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *California Dental Ass'n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297.

Legal issues are for the courts to resolve, although even in considering such issues the court is to give deference to the Commission's informed judgments. *See* *California Dental Ass'n*, 128 F.3d at 725; *Olin*, 986 F.2d at 1297; *see also* *United States v. Louisiana-Pac. Corp.*, 754 F.2d 1445, 1447 (9th Cir. 1985) (great deference should be given to the FTC's interpretation of the Federal Trade Commission Act). Whether a district court has given the FTC's findings of fact and conclusions of law appropriate weight is reviewed de novo. *See* *Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1030 (9th Cir. 2001).

8. Immigration and Naturalization Service ("INS")

Note the INS was abolished by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the majority of its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement, a part of the Department of Homeland Security. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003).

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, v. Immigration.

9. Interior Board of Land Appeals ("IBLA")

Decisions of the IBLA are reversed only if "arbitrary, capricious, not supported by substantial evidence, or contrary to law." *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001); *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074-75 (9th Cir. 1999) (noting limited standard of review); *Hoefler v. Babbitt*, 139 F.3d 726, 727 (9th Cir. 1998) (noting review is under the APA). To make that determination, "[t]his court carefully search[es] the entire record to determine whether it contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and whether it demonstrates that the decision was based on a consideration of relevant factors." *Akootchook*, 271 F.3d at 1164 (quoting *Hjelvik*, 198 F.3d at 1074).

10. Labor Benefits Review Board

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas Labor Law, x. Labor Law.

11. Federal Mine Safety and Health Review Commission

The Mine Safety and Health Administration's decisions are reviewed under the arbitrary and capricious standard. *See Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998). Findings of fact are reviewed for substantial evidence. *See id.* at 1183. This court will defer to the agency's interpretation of its regulations. *See D.H. Blattner & Sons, Inc. v. Secretary of Labor, Mine Safety and Health Comm.*, 152 F.3d 1102, 1105 (9th Cir. 1998) (noting interpretations

must be "reasonable" and "conform" to the purpose and wording of the regulations).

12. National Labor Relations Board

See III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, x. Labor Law, iv. National Labor Relations Board.

13. National Transportation Safety Board ("NTSB")

Review of an order of the NTSB is "narrowly circumscribed." *See* *Olsen v. NTSB*, 14 F.3d 471, 474 (9th Cir. 1994). Review is conducted in accordance with the Administrative Procedure Act; this court must affirm unless the NTSB's order is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* *Gilbert v. NTSB*, 80 F.3d 364, 368 (9th Cir. 1996); *Borregard v. NTSB*, 46 F.3d 944, 945 (9th Cir. 1995). The NTSB's decision must be based on the relevant factors and may not constitute a clear error of judgment. *See* *Gilbert*, 80 F.3d at 368. The Board's factual findings are conclusive if supported by substantial evidence. *See* *Borregard*, 46 F.3d at 945; *Olsen*, 14 F.3d at 474. Pure legal questions are reviewed de novo. *See* *Wagner v. NTSB*, 86 F.3d 928, 930 (9th Cir. 1996); *Borregard*, 46 F.3d at 945. The agency's interpretations of its own organic statute and regulations, however, are accorded deference, unless the administrative construction is clearly contrary to the plain and sensible meaning of the statute or regulation. *See* *Borregard*, 46 F.3d at 945; *Reno v. NTSB*, 45 F.3d 1375, 1378 (9th Cir. 1995). The Board's award of attorneys' fees is reviewed for an abuse of discretion. *See* *Mendenhall v. NTSB*, 213 F.3d 464, 470 (9th Cir. 2000) (as amended on denial of rehearing), *overruled on other grounds by Gonzalez v. Arizona*, Nos. 08-17094, 08-17115, --- F.3d ---, 2012 WL 1293149, at *2 n.4 (9th Cir. April 17, 2012).

14. Occupational Safety and Health Review Commission ("OSHRC")

The appellate court must "uphold a decision of the OSHRC unless it is arbitrary and capricious, not in accordance with the law, or in excess of the authority granted by the OSHA….[T]he Commission's factual findings [are reviewed] under the substantial evidence standard; and [the court] accept[s]

reasonable factual inferences drawn by the Commission." *Loomis Cabinet Co. v. OSHRC*, 20 F.3d 938, 941 (9th Cir. 1994) (citations omitted). The court "must uphold the factfinder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, even if it is possible to draw different conclusions from the evidence." *Id.*; *see also R. Williams Const. Co. v. OSHRC*, 464 F.3d 1060, 1063 (9th Cir. 2006). Thus, the Commission's findings must be affirmed "if supported by substantial evidence on the record considered as a whole." *See Chao v. Symms Fruit Ranch, Inc.*, 242 F.3d 894, 897 (9th Cir. 2001) (internal quotation omitted); *see also R. Williams Constr. Co.*, 464 F.3d at 1063.

"While the proper interpretation of a statute is a question of law reviewed de novo, the court must give deference to [OSHRC's] interpretation of statutes that it administers." *Herman v. Tidewater Pac., Inc.*, 160 F.3d 1239, 1241 (9th Cir. 1998) (citations omitted). Note, however, that where interpretations of the Secretary of Labor and the Commission are in conflict, this court must defer to the Secretary's reasonable interpretation. *See Chao*, 242 F.3d at 897; *Herman*, 160 F.3d at 1241. When the meaning of regulatory language is ambiguous, the Secretary's interpretation controls "so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations." *Crown Pacific v. OSHRC*, 197 F.3d 1036, 1038 (9th Cir. 1999) (internal quotation omitted); *see also Chao*, 242 F.3d at 897 (noting deference is owed only if the Secretary's interpretation is reasonable).

15. Railroad Retirement Board ("RRB")

The RRB's findings of fact are conclusive "if supported by evidence and in the absence of fraud." 45 U.S.C. § 355(f). This circuit has construed this standard to be a "substantial evidence" test. *See Calderon v. Railroad Retirement Bd.*, 780 F.2d 812, 813 (9th Cir. 1986); *Estes v. Railroad Retirement Bd.*, 776 F.2d 1436, 1437 (9th Cir. 1985). The Board's application of a regulation will be upheld if it is a permissible construction of the Railroad Retirement Act. *See Capovilla v. Railroad Retirement Bd.*, 924 F.2d 885, 887 (9th Cir. 1991).

16. Railway Adjustment Board

The scope of review of Railway Adjustment Board awards under the Railway Labor Act (RLA) is "among the narrowest known to the law." *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1362 (9th Cir. 1996); *English v. Burlington N. R.R.*, 18 F.3d 741, 743 (9th Cir. 1994). The RLA allows the court to review Adjustment Board decisions on three specific grounds only: (1) failure of the Board to comply with the Act; (2) failure of the Board to conform, or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *See Fennessy*, 91 F.3d at 1362; *English*, 18 F.3d at 743-44. Whether a district court has subject matter jurisdiction under the RLA is a question of law reviewed de novo. *See Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, 280 F.3d 901, 904 (9th Cir. 2002).

17. Securities Exchange Commission

The Securities Exchange Commission's ("SEC") factual findings are reviewed for substantial evidence. *See Ponce v. SEC*, 345 F.3d 722, 728 (9th Cir. 2003); *Krull v. SEC*, 248 F.3d 907, 911 (9th Cir. 2001); *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997). Deference is owed to the agency's construction of its own regulations unless its interpretation is "unreasonable" or "plainly erroneous." *See Ponce*, 345 F.3d at 728; *Alderman* 104 F.3d at 288; *see also Vernazza v. SEC*, 327 F.3d 851, 858 (9th Cir. 2003), *amended by* 335 F.3d 1096 (9th Cir. 2003) (noting when deference is owed).

The district court's interpretation of the Securities Exchange Act is reviewed de novo. *See SEC v. McCarthy*, 322 F.3d 650, 654 (9th Cir. 2003); *McNabb v. SEC*, 298 F.3d 1126, 1130 (9th Cir. 2002). The court's determination that a transaction is a security for purposes of the Act is reviewed de novo. *See SEC v. Rubera*, 350 F.3d 1084, 1089 (9th Cir. 2003). Whether the court's decision to enforce a SEC order violates due process is a question of law reviewed de novo. *See McCarthy*, 322 F.3d at 654. The district court's decision to issue an injunction to enforce an SEC order is reviewed for an abuse of discretion. *See SEC v. Wallenbrock*, 313 F.3d 532, 536 (9th Cir. 2002).

The SEC's imposition of sanctions is reviewed for an abuse of discretion. *See Ponce*, 345 F.3d at 728-29; *Vernazza*, 327 F.3d at 858; *Krull*, 248 F.3d at 912. A disgorgement order is reviewed for an abuse of

discretion. *See SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1190 (9th Cir. 1998); *SEC v. Colello*, 139 F.3d 674, 675 (9th Cir. 1998). The district court's decision to freeze assets to enforce a contempt order arising from the failure to disgorge is reviewed for an abuse of discretion. *See SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.), *amended by* 335 F.3d 834 (9th Cir. 2003).

See also III. Civil Proceedings, C. Trial Decisions in Civil Cases, 27. Substantive Areas of Law, z. Securities.

18. Social Security Administration

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. *See Carillo-Yeras v. Astrue*, 671 F.3d 731, 734 (9th Cir. 2011); *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009); *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 595 (9th Cir. 2004); *Batson v. Commissioner of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003). "Our review of the Commissioner's decision is 'essentially the same as that undertaken by the district court.'" *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999) (quoting *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985)).

The decision of the Commissioner must be affirmed if it is supported by substantial evidence and the Commissioner applied the correct legal standards. *See Carillo-Yeras*, 671 F.3d at 734; *Lewis*, 498 F.3d at 911; *Batson*, 359 F.3d at 1193; *Benton*, 331 F.3d at 1035; *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir. 2003). When reviewing factual determinations by the Commissioner, acting through the administrative law judge ("ALJ"), this court affirms if substantial evidence supports the determinations. *See Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003); *Saelee v. Chater*, 94 F.3d 520, 521 (9th Cir. 1996) (per curiam).

Substantial evidence is more than a mere scintilla, but less than a preponderance. *See Lewis*, 498 F.3d at 911; *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011 (9th Cir. 2003); *Connett*, 340 F.3d at 873; *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001). Substantial evidence, considering the entire record, is relevant evidence which a reasonable person might accept as adequate to support a conclusion. *Howard*, 341 F.3d at 1011; *Morgan v. Commissioner of the Soc. Sec.*

Admin., 169 F.3d 595, 599 (9th Cir. 1999); *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). If the evidence can reasonably support either affirming or reversing the Commissioner's conclusion, the court may not substitute its judgment for that of the Commissioner. *See Lewis*, 498 F.3d at 911; *Batson*, 359 F.3d at 1196; *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002).[10]

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *See Benton*, 331 F.3d at 1040; *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (as amended on rehearing). The ALJ, however, cannot discount a claim of excess pain without making specific findings justifying that decision. *See Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1996). These findings must be supported by clear and convincing reasons and substantial evidence in the record as a whole. *See id.* The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. *See Edlund*, 253 F.3d at 1156; *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

The Commissioner's interpretation of social security statutes or regulations is entitled to deference. *See Campbell ex rel. Campbell v. Apfel*, 177 F.3d 890, 893 (9th Cir. 1999) (regulation and statute); *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997) (statute); *Esselstrom v. Chater*, 67 F.3d 869, 872 (9th Cir. 1995) (regulations).[11] A court need not accept an agency's interpretation of its own regulations if that interpretation is inconsistent with the wording of the regulations or statute under which the regulations were promulgated. *Esselstrom*, 67 F.3d at 872.

Whether new evidence justifies a remand to the Commissioner is reviewed de novo. *See Mayes v. Massanari*, 276 F.3d 453, 461-62 (9th Cir. 2001) (clarifying standard); *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir.

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[10] *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) (as amended on rehearing) (reversing for lack of substantial evidence to support ALJ rejection of examining psychologist's findings); *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (reversing for lack of substantial evidence).

[11] *See also Pagter v. Massanari*, 250 F.3d 1255, 1262 (9th Cir. 2001) (determining SSA interpretation was not erroneous or inconsistent with the regulation).

2000). Whether the claimant has shown good cause is reviewed, however, for an abuse of discretion. *See Mayes*, 276 F.3d at 462. The district court's decision whether to remand for further proceedings or for immediate payment of benefits is reviewed for an abuse of discretion. *See Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003); *Harman*, 211 F.3d at 1175-78.

Fee awards made pursuant to the Social Security Act, 42 U.S.C. § 406(b)(1), are reviewed for an abuse of discretion. *See Crawford v. Astrue*, 586 F.3d 1142, 1146-47 (9th Cir. 2009) (en banc); *Clark v. Astrue*, 529 F.3d 1211, 1213 (9th Cir. 2008); *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir. 1998). An abuse of discretion occurs if the district court does not apply the correct law or rests its decision on a clearly erroneous finding of fact. *See Clark*, 529 F.3d at 1214.